

Service Date: March 20, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Application of)	UTILITY DIVISION
Firstel, Inc. and)	
U S WEST Communications, Inc.)	DOCKET NO. D98.1.15
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	ORDER NO. 6059
Approval of their Resale Agreement)	

FINAL ORDER APPROVING RESALE AGREEMENT

Introduction and Procedural Background

1. The Telecommunications Act of 1996 (1996 Act) sets out methods by which local competition may be encouraged in local exchange markets which historically have been monopolistic. One of the paths to a competitive local exchange market set forth in the 1996 Act is resale of services. See 47 U.S.C. •• 251(b)(1) and (c)(4). Parties can voluntarily negotiate agreements for resale or they may request state commissions to mediate or arbitrate unresolved issues.

47 U.S.C. • 252. Once agreement is reached voluntarily or by arbitration, the parties to the agreement must submit it to the appropriate state commission for approval. 47 U.S.C. • 252(e).

2. U S WEST Communications, Inc. (U S WEST) entered into an interconnection agreement with Firstel, Inc. (Firstel) for resale of U S WEST services according to the 1996 Act. U S WEST filed the agreement, entitled "Agreement for Service Resale" (Agreement) with the Montana Public Service Commission (Commission) on January 29, 1998. The Agreement was docketed as D98.1.15. It provides for Firstel to resell U S WEST's local exchange services in Montana.

3. The Commission issued a Notice of Application for Approval of Resale Agreement and Notice of Opportunity to Intervene and Comment on February 6, 1998, giving public notice of the requirements that the Commission approval of the application be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by February 17, 1998. The notice further stated that interested persons could submit limited comments on whether the agreement met these requirements no later than March 2, 1998.

4. The Commission's published notice advised interested parties in the geographic areas affected by the Agreement that intervention was limited and that the Montana Consumer Counsel (MCC) could be contacted to represent consumer interests. No hearing has been requested and no comments on the Agreement or requests for intervention in the Docket have been received. The Agreement is substantially the same as previously approved resale agreements between U S WEST and other resellers.

Applicable Law and Commission Decision

5. The standards for approving an interconnection agreement differ, depending on whether the Agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. • 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. • 252(e)(2)(A).

6. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by April 29, 1998--90 days following the submission of the Agreement for Commission approval.

7. The Commission must approve or reject an agreement, with written findings as to any deficiencies. 47 U.S.C. • 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

- (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. • 252(a)] if it finds that
 - (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
 - (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

8. Notwithstanding the limited grounds for rejection in 47 U.S.C. • 252(e)(2)(A), the Commission's authority is preserved in • 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance

with state telecommunications service quality standards or requirements. Such compliance is subject to • 253 of the 1996 Act which does not allow states to permit or impose any statutes,

regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

9. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in • 251(b) and (c). 47 U.S.C. •• 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for resale that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in • 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

10. By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that •• 252(a) and (c) prevent the Commission from addressing such issues in these proceedings.

11. No comments have been received that indicate that the Agreement does not comply with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and necessity.

12. The Commission finds that the Agreement appears to conform to the standards required by the Act. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity. The Commission finds that the Agreement should be approved, except as indicated below.

13. With the exception of particular sections of the Agreement as discussed below, the Commission finds that the terms in the Agreement appear to conform to the standards required by the Act. In approving this Agreement, the Commission is guided by provisions in state and federal law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

14. The Commission rejects the following terms:

a. Ordering and Maintenance - Section IV.C.4(d) (p. 6) includes a provision that Proof of Authorization for placing orders on behalf of the end

user shall consist of documentation acceptable to U S WEST, which may be obtained by "A prepaid returnable postcard supplied by Reseller which has been signed and returned by end user. Reseller will wait fourteen (14) days after mailing the postcard before placing an order to change." This subsection is not consistent with Montana law and is rejected. See • 69-3-1303, MCA.

b. Construction - Section IV.E.7 of the Agreement (p. 10) states:
Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Reseller requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance facilities, USWC will develop and provide to Reseller a price quote for the construction. If the quote is accepted, Reseller will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected. Circumstances may arise where U S WEST is required by law to construct facilities. The parties may agree to the terms in Section IV.E.7 for instances where U S WEST is not required to construct facilities, but the Commission rejects this section as presently written because it does not consider those instances where U S WEST might be required by law to construct facilities. The parties may amend this section of the Agreement to so provide.

c. Payment - Section VII.C (p. 11) sets forth in detail the provisions for payment to U S WEST by Firstel. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. According to • VII.C.5, Firstel's payments to U S WEST, if not made pursuant to the terms of this section, could place Firstel's end user customers' services in jeopardy of being disconnected through no fault on their part. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Firstel. If notified of a pending termination of service to customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to end users with no notification to the Commission. The Commission rejects • VII.C.5 of the Agreement. The parties may amend this section of the Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time to take any appropriate action to protect end users.

d. Dispute Resolution - Section VII.Q (p. 18) sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by

the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of their Agreement to address this concern.

15. The Commission further notes that the sections just discussed have appeared in other interconnection agreements between U S WEST and resellers in Montana and have been rejected by the Commission. U S WEST's persistence in using these terms despite their continued rejection creates additional work for the Commission, its staff, and the parties to the agreements. Once a contract provision is rejected and the reasons for the rejection are explained, the provision should not be included in future agreements. This will lessen the need for further amendments to the agreements and will expedite resellers market entry.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. Firstel intends to resell telecommunications services in U S WEST territories throughout Montana. Section 69-3-803(3), MCA (1995), provided an exemption from Commission regulation for resellers. Senate Bill 89, passed by the 1997 Montana Legislature and signed into law by the Governor of Montana on April 22, 1997, removes the exemption from regulation in Montana for resellers of regulated telecommunications services. Section 69-3-803(6)(a)(b), MCA. As a reseller of regulated telecommunications services in Montana, Firstel will be subject to Commission authority to supervise, regulate and control public utilities. Before providing service in Montana, Firstel initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if they have not already done so. Section 69-3-805, MCA.

3. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. See generally, the Telecommunications Act of 1996, Pub. L. No. 104-

104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. •• 151, et seq.). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to • 252(e)(2)(A). Section 69-3-102, MCA.

7. Approval of resale agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. • 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the Firstel Agreement by April 29, 1998, or the Agreement will be deemed approved.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. • 252(e)(2)(A).

Order

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THEREFORE, based upon the foregoing, it is ORDERED that the resale Agreement of U S WEST and Firstel in this Docket, submitted to this Commission for approval pursuant to the 1996 Act, is approved, subject to the exceptions discussed herein and subject to the following conditions:

1. The parties may file amendments to the Agreement without delay consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

It is further ORDERED that future agreements submitted to this Commission for approval pursuant to 47 U.S.C. • 252 shall not include the verbatim language that has been rejected in this and previous orders.

DONE AND DATED this 16th day of March, 1998, by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.